Subject Index

	Page
Citations to opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	7
I. This court has no jurisdiction in this matter since there is no substantial federal question involved in the decision of the California Supreme Court	7
A. Historical background	7
B. No substantial federal questions are raised	12
1. The adoption of the Dorado rule in the law relating to California criminal procedure does not raise any substantial federal question. (Question No. 2.)	12
2. The adoption of the Stewart rule in the law relating to California criminal procedure does not raise any substantial federal question. (Questions Nos. 3 and 4.)	14
3. The adoption of the Polk rule in the law relating to California criminal procedure does not raise any substantial federal question. (Question No. 1.)	16
II. Certiorari should be denied as an exercise of sound judicial discretion because the decision of the state court is essentially correct	19
A. The prospective operation of Escobedo and Dorado does extend to the guilt trial in the present case	19
1. There was no final judgment on the issue of guilt as to preclude the application of the Dorado rule when the guilt judgment was reversed by the court below	20
2. There is no valid ground for depriving respondents of the prospective application of the	

Page

Dorado rule under the Linkletter test merely because they had not petitioned for certiorari within 90 days after the first decision of the State Supreme Court affirming the judgment on the issue of guilt 25

B. The Dorado and Stewart decisions involve correct interpretations of the Federal Constitution and should not be reviewed by this court 28

Conclusion 29

Table of Authorities Cited

Cases Pages

Berman v. U.S., 302 U.S. 211, 82 L.Ed. 204, 58 S.Ct. 165...21, 22

Black v. Cutter Laboratories, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 13

Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 21

California v. Dorado, 381 U.S. 937, 85 S.Ct. 1765.....passim

California v. Stewart, 381 U.S. 937.....14, 15, 28

Corey v. U.S., 375 U.S. 169, 11 L.Ed.2d 229, 84 S.Ct. 298.. 22

Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 .....passim

Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S. Ct. 792 7

Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459.. 13

In re Lopez, 62 C.2d 368, 398 P.2d 380, 42 Cal.Rptr. 188 .....10, 16, 17

In re Newbern, 53 C.2d 786, 350 P.2d 116, 3 Cal.Rptr. 364 7

Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 60, 85 S.Ct. 1731 .....10, 11, 17, 19, 20

Pages

Mapp v. Ohio, 376 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 10
Maryland v. Baltimore Radio Show, 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252 18
Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429 13

New York v. O'Neill, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564 18

Parr v. U.S., 351 U.S. 513, 100 L.Ed. 1377, 76 S.Ct. 912... 21
People v. Berve, 51 C.2d 286, 332 P.2d 97 15
People v. Dorado, 62 C.2d 338, 398 P.2d 361, 42 Cal.Rptr. 169 .....passim
People v. Ketchel, 63 A.C. 921, 409 P.2d 694, 48 Cal.Rptr. 614 .....24, 27
People v. Morse, 60 C.2d 631, 388 P.2d 33, 36 Cal.Rptr. 201 17
People v. Polk, 61 C.2d 217, 390 P.2d 641, 37 Cal.Rptr. 753 .....4, 5, 6, 11, 17
People v. Stewart, 62 C.2d 571, 400 P.2d 97, 43 Cal.Rptr. 201 10
People v. Trout, 54 C.2d 576, 354 P.2d 231, 6 Cal.Rptr. 759 15

Reece v. Georgia, 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167.. 22

Wilson v. Loew's Incorporated, 355 U.S. 597, 2 L.Ed.2d 519, 78 S.Ct. 526 16

Constitutions

California Constitution, Article I, Section 13 .....7, 10, 14
United States Constitution, Fourteenth Amendment 12

Rules

Rules of the United States Supreme Court:
Rule 19 19
Rule 22 .....11, 24

Statutes

18 U.S.C. Section 4208(b) 22
28 U.S.C. Section 1257(3) 12, 21

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 880

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

RONALD HOWARD POLK
and GEORGE ANTHONY GREGG,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of California, entered in the above entitled cause on October 20, 1965, be denied.

CITATIONS TO OPINION BELOW

The three opinions of the California Supreme Court involving this criminal action are set forth in Appendices A, B and C to the Petition for Writ of Certiorari filed by the California Attorney General.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. section 1257 (3) upon the ground that a right has been specially set up and granted under the Constitution of the United States. Respondents contend that no substantial Federal question is involved in the decision below and, therefore, that this Court does not have jurisdiction to review the judgment of the California Supreme Court in this case. The reasons in support of this contention are set forth more fully in the Argument.

QUESTIONS PRESENTED

1. Does the prospective operation of *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, extend to a final state court conviction in which time to petition this Court for certiorari had not expired on the date *Escobedo* was decided although no petition to review said state court conviction was presented to this Court?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise him of his right to consult with counsel and his right to remain silent?

3. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason

of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a knowing and intelligent waiver of both (a) his right to consult with counsel and (b) his right to remain silent?

4. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

STATEMENT

Respondents Ronald Polk and George Gregg, two indigent persons, were arrested in Los Angeles, California, on May 20, 1962. After their arrests, and while they were in custody, certain police officers questioned them concerning their participation in the killing of William Fambro which had occurred on or about March 31, 1962, in Tulare County, California. During the process of the questioning, which continued for several months after the arrests, the police officers obtained numerous conflicting and contradictory confessions from both respondents concerning the murder of Fambro and other criminal offenses. At the subsequent trial, one police officer estimated that he talked to respondent Gregg twenty times and to respondent Polk ten times. No evidence was presented at either of respondents' subsequent trials that they were at any time during the prolonged police interrogations informed that they could have the advice of counsel or that they could remain silent. (Opinion of Cali-

fornia Supreme Court, *People v. Polk,* Petition, Appendix A, pp. 34-35.)

Respondents were charged by Indictment in Tulare County with the kidnapping and murder of Fambro and with conspiracy to kidnap for the purpose of robbery. Because they were indigent, counsel were appointed by the trial court to represent them. Following trial by jury the respondents were convicted of first degree murder and the penalty was fixed at death. Judgments of the trial court were entered on January 14, 1963. (CT 96.) The entry of the judgments terminated the appointments of trial counsel.

An automatic appeal was had to the California Supreme Court. New counsel were appointed by the Appellate Court to represent respondents on appeal. The California Supreme Court affirmed the judgments as to guilt but reversed on the penalty issue. (*People v. Polk,* 61 C.2d 217, 390 P.2d 641, 37 Cal.Rptr. 753.) The decision of the Appellate Court was filed on March 31, 1964. (CT 1.) Remittitur was filed with the trial Court on May 4, 1964. (CT 1.) The filing of remittitur terminated the appointments of appellate counsel.

On May 8, 1964, the trial Court ordered respondents' return to the jurisdiction of that Court for re-trial on the penalty issue. (CT 2.) Respondents were brought before the trial Court on May 19, 1964 at which time the Tulare County Public Defender's Office was appointed to represent them at the second penalty trial. (CT 2, 4.) On May 19, 1964, the Public Defender's Office moved to withdraw on the grounds

of a conflict of interests. (CT 5-9.) On May 22, 1964, the motions to withdraw were granted. (CT 10.) Thereupon two new attorneys were appoined to represent respondents at the second penalty trial. (CT 10, 11.) The newly appointed attorneys had no previous contact or familiarity with the case. Furthermore, they were only appointed to represent respondents at trial. On May 25, 1964, a trial date was set for July 20, 1964. (CT 12-13.)

On June 22, 1964, this Court filed its decision in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758. It is not known when the opinion was reported and made available in Tulare County, or whether the trial Court or newly appointed trial counsel were even aware of the decision prior to the commencement of the second penalty trial.

On July 20, 1964, the second penalty trial commenced. Following the trial the jury again fixed the penalty at death for each respondent. On automatic appeal the California Supreme Court filed a decision on June 18, 1965, which again reversed the judgments as to penalty. (*People v. Polk,* 62 A.C. 951.)

A rehearing was granted on July 14, 1965. Upon rehearing the California Supreme Court considered the question of error occurring during the first trial on the issue of guilt by virtue of the introduction of respondents' confessions in contravention of the exclusionary rule adopted by the California Courts in *People v. Dorado,* 62 C.2d 338, 398 P.2d 361, 42 Cal. Rptr. 169. The Court held that such error did occur and that the exclusionary rule applied since the judg-

ment as to guilt was not final prior to the decision of this Court in *Escobedo v. Illinois, supra.* For these reasons the California Supreme Court recalled its previously issued remittitur of March 31, 1964, and reversed the judgments in their entirety. (*People v. Polk,* 63 A.C. 461, 406 P.2d 641, 47 Cal.Rptr. 1.) It is this decision that Petitioner now seeks to have reviewed by this Petition for a writ of certiorari.

The evidence concerning the facts and circumstances of the alleged crimes, as well as the evidence concerning the history and background of the respondents, is summarized in the opinions of the California Supreme Court as set forth in Appendices A, B, and C of the California Attorney General's Petition. These opinions report the essential evidence bearing upon the questions presently before this Court. It has been determined that confessions were elicited from respondents while in custody after prolonged police interrogation. Although the confessions can be characterized as "free and vountary", there is no showing that respondents were aware or were advised that they could have the assistance of counsel before responding to the interrogations or that they could remain silent in face of such questioning. It was primarily on the bases of the confessions that convictions of first degree murder were secured against respondents. As the California Supreme Court pointed out:

> "Had the confessions been excluded, there would have been so little evidence against them (respondents) as to obviate any need to take the stand."

ARGUMENT

I. THIS COURT HAS NO JURISDICTION IN THIS MATTER SINCE THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED IN THE DECISION OF THE CALIFORNIA SUPREME COURT.

A. Historical background.

In 1963 this Court handed down the landmark decision in *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792, wherein it was held that in all state criminal prosecutions the accused shall enjoy the right to have the assistance of counsel. By applying the provisions of the Sixth Amendment to all state criminal proceedings, via the Fourteenth Amendment, the *Gideon* decision broadened the base of those *uniform minimum standards* of procedural due process which must be adhered to in all state prosecutions to include the fundamental right to counsel. Of course, many states had adopted such a rule even prior to *Gideon,* either by virtue of statutory or state constitutional decree. For instance, Art. I, Section 13 of the California Constitution has always provided that "(I)n criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend, in person and with counsel". Before *Gideon* the California Supreme Court had interpreted this California constitutional provision to require that all persons accused of crime in any Court in the state have a right to counsel, including the right to appointed counsel in the case of financial indigency. (See *In re Newbern,* 53 C.2d 786, 350 P.2d 116, 3 Cal.Rptr. 364.) *Gideon* merely compelled all remaining states to meet the *minimum* requirements

of the Federal Constitution in providing the right to counsel to accused in all state criminal proceedings.

On June 22, 1964, the minimum guarantees inherent in the right to counsel were further elucidated by this Court in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758. The particular facts of that case involve a defendant who had been arrested by state police officers. While in custody incriminating statements were elicited from the defendant during interrogations conducted prior to formal indictment. Throughout the interrogations the police denied the defendant's request to consult with his attorney. It was held:

> "(W)here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution and 'made obligatory upon the States of the Fourteenth Amendment,' . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (378 U.S. 478 at 490-491.)

Subsequent to *Escobedo* the California Supreme Court decided *People v. Dorado,* 62 C.2d 338, 169 P.

2d 361, 42 Cal.Rptr. 169. The facts of *Dorado* were substantially similar to *Escobedo* except that the defendant neither retained nor requested an attorney during the time when incriminating statements were elicited from him. Evidence was introduced which showed that the police had not informed the defendant that he could remain silent or have the advice of counsel before answering their questions. The California Supreme Court held that the defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed the defendant of his right to counsel or of his right to remain silent and the defendant had not waived these rights. The Court stated as a *reason* for its decision that it was compelled to the result by the ruling of this Court in *Escobedo*. However, the opinion in *Dorado* also makes reference to Art. I, Section 13 of the California Constitution and points out that the right to the assistance of counsel during the *accusatory* stage is one that was recognized in California even prior to *Escobedo*. (62 C.2d 338 at 348-349.) Therefore, although the opinion in *Dorado* represents a State Court interpretation of a Federally created right under the Sixth and Fourteenth Amendments of the United States Constitution, it also provides a State Court interpretation and application of the Due

Process and Right to Counsel clauses contained in Art. I, Section 13 of the California Constitution.

In *People v. Stewart,* 62 C.2d 571, 400 P.2d 97, 43 Cal.Rptr. 201, the California Supreme Court held that no presumption that the defendant had been advised of his right to counsel would arise from a silent record. Absent evidence of an intelligent waiver of the right to counsel, a conviction based on a confession obtained in violation of the rule set forth in *Dorado* must be reversed.

The question of the potential retrospective effect of the *Dorado* rule first arose in the case of *In re Lopez,* 62 C.2d 368, 398 P.2d 380, 42 Cal.Rptr. 188. In that decision the California Supreme Court held, for a variety of reasons, that the *Dorado* rule could not serve as a basis for attack upon judgments in "cases which have become final prior to the date that the United States Supreme Court rendered the *Escobedo* decision". (62 C.2d 368 at 372.) However, the term "final judgment" (taken in the context of the problem of the prospective effect of constitutional decisions) was not given definition in *Lopez.*

Subsequent to *Lopez* this Court decided *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed.2d 60, 85 S.Ct. 1731, which involved the question whether the exclusionary rule of *Mapp v. Ohio,* 376 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, was retrospective in effect. It was held that the exclusionary rule did not apply to state Court convictions which had become final before rendition of the *Mapp* decision. The term "final" was defined as follows:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*". (381 U.S. at 622, fn. 5.)

In the decision of the California Supreme Court from which review is sought in the instant case (*People v. Polk*, 63 A.C. 461, 406 P.2d 641, 47 Cal. Rptr. 1), it was held that the defendants' confessions were introduced during the guilt trial in violation of the *Dorado* rule since the defendants were in custody at the time that the statements were elicited and there was no evidence introduced to show that they had been informed of their right to counsel. It further was held that the original judgment of guilt had not become final (within the definition of finality set forth in *Linkletter v. Walker, supra*) prior to the date of the *Escobedo* decision and therefore that the judgments of conviction must be reversed. The Court pointed out that the defendants still had time to petition for certiorari to this Court from the original decision of the California Supreme Court affirming the judgment of conviction, under Rule 22 of the Rules of the United States Supreme Court, at the time that *Escobedo* was decided and, therefore, that the original judgments of conviction were not "final" at the crucial point of time.

Petitioner now seeks to have this Court review the correctness of rules announced by the California Supreme Court in *Dorado* (Question No. 2), *Stewart* (Questions Nos. 3 and 4), and *Polk* (Question No. 1),

since all three rules were applied in the decision below from which certiorari is sought. Respondents contend that certiorari should not be granted because (1) the rulings of the California Supreme Court in these decisions do not involve substantial federal questions, and (2) the rulings of the California Supreme Court reflect correct interpretations of those provisions of the Federal Constitution upon which they are, *in part,* based.

B. No substantial federal questions are raised.

1. The adoption of the Dorado rule in the law relating to California criminal procedure does not raise any substantial federal question. (Question No. 2.)

Petitioner alleges that this Court should accept jurisdiction in the instant case because the decision below presents questions not previously determined by this Court "which are of great importance in the field of criminal law". Assuming the allegation to be correct, it presents a necessary but insufficient condition to invoking the jurisdiction of this Court.

Under 28 U.S.C. section 1257 (3) it is essential to the jurisdiction of this Court that a substantial federal question be raised. Therefore, state Court decisions which involve matters of local practice and procedure are not subject to Federal Review so long as such practices and procedures conform to the minimum standards of procedural due process guaranteed by the Fourteenth Amendment. Furthermore, this Court has consistently adhered to the principle that it will not review a state Court judgment based upon an adequate and independent non-federal ground, even

though a federal question be involved and perhaps wrongly decided. *Murdock v. Memphis,* 20 Wall. 590, 22 L.Ed. 429; *Black v. Cutter Laboratories,* 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824. The reason for this limitation is described in *Herb v. Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." (324 U.S. 117, at 125-126.)

In view of these principles it is obvious that the *Dorado* rule (Question No. 2) is not subject to review by this Court. Indeed, such must have been the conclusion of this Court when the petition for a writ of certiorari was denied by this Court in *California v. Dorado,* 381 U.S. 937, 85 S.Ct. 1765. Whether or not the *Dorado* decision involves a misinterpretation of *Escobedo* or of Federally created due process guarantees, it is clear that it does not result in an infringement of any right claimed under the Federal Constitution. That is, the *Dorado* rule, if anything, broadens the right to counsel during the accusatory

stage of the criminal process in so far as California criminal procedure is concerned. Even though the *Escobedo* decision was stated to be a *reason* for the holding of the California Supreme Court in *Dorado,* it is clear that the latter case only provides a rule solely involving California criminal procedure and, furthermore, a rule which does not contravene the minimum requirements of procedural due process prescribed by the Federal Constitution.

In addition, the *Dorado* decision is based on an adequate and independent state ground; namely, the Due Process and Right to Counsel provisions of Art. I, Section 13 of the California Constitution. Certainly the state Court is empowered under our Federal system to construe such provisions more broadly than the uniform minimum requirements of the Federal Constitution as defined by this Court in such cases as *Escobedo.* For all of these reasons the conclusion seems inescapable that this Court does not have the power to consider Question No. 2 presented by the Petitioner in this case.

2. The adoption of the Stewart rule in the law relating to California criminal procedure does not raise any substantial federal question. (Questions Nos. 3 and 4.)

The effort of Petitioner to have this Court consider Questions 3 and 4, insofar as this would involve a review of the decision of the California Supreme Court in the *Stewart* case, is even more untenable than that involved with Question No. 2. The *Stewart* rule solely concerns matters of proof and evidentiary suffi-

ciency. The rule simply requires that an evidentiary foundation be laid by the prosecution in any state criminal trial showing that the defendant was properly advised of his right to counsel and of his right to remain silent before any confession of that defendant be introduced. Rules of this kind have always been considered to be matters of local practice and procedure and therefore not subject to federal review. Furthermore, the *Stewart* rule is entirely in keeping with the traditional California approach to the admissibility of confessions in criminal cases. It has long been the rule in California practice that no confession of a defendant may be introduced until a preliminary showing is made by the prosecution that such a statement was free and voluntary. (See *People v. Trout,* 54 C.2d 576, 354 P.2d 231, 6 Cal.Rptr. 759; *People v. Berve,* 51 C.2d 286, 332 P.2d 97.) That rules of this kind may be more liberal than the minimum requirements of Federal procedural Due Process is no proper reason for subjecting them to Federal review, even if they should have been arrived at upon a misconception of minimum Federal standards. Clearly this Court has no legitimate power to grant certiorari on a consideration of Questions Nos. 3 and 4 presented by Petitioner in this case. It is urged by these respondents that this Court exercise its power to dismiss the writ of certiorari in *California v. Stewart,* 381 U.S. 937 (raising questions identical to Nos. 3 and 4 contained in the present petition), as improvidently granted because the judgment in the California Supreme Court decision in that case rests on an ade-

quate state ground. *Wilson v. Loew's Incorporated,* 355 U.S. 597, 2 L.Ed.2d 519, 78 S.Ct. 526.

3. The adoption of the Polk rule in the law relating to California criminal procedure does not raise any substantial federal question. (Question No. 1.)

By its decision in *In re Lopez,* 62 C.2d 368, 398 P.2d 380, 42 Cal.Rptr. 188, the California Supreme Court held that the *Dorado* rule would not be applied retroactively in California; that the rule would not serve as a basis for collateral attack upon judgments which became "final" before the date upon which this Court decided *Escobedo.* The reasons adopted for this ruling in *Lopez* are as follows:

> "We reach this conclusion upon the basis of the three following propositions which we shall more fully analyze hereinafter: First, although the United States Supreme Court in *Escobedo,* by providing a suspect with an opportunity to obtain the protection of counsel at the accusatory stage, sought to eliminate conditions which invited coerced confessions, the ruling does not require a retroactive application. Second, new interpretations of constitutional rights have been, and should be, applied retroactively only in those situations in which such new rules protect the innocent defendant against the possibility of conviction of a crime he did not commit; the fact that defendant was denied counsel under *Escobedo* does not affect the issue of guilt. Third, an absolute rule of retroactivity as to interpretations of constitutional rights which envisage the correction of future practices would impair the administration of criminal law and ultimately result in constitutional rigidity". (62 C.2d 368 at 372.)

Without regard to the question of the validity of these reasons or of the ultimate conclusion reached in *Lopez,* it is obvious that the state Court there decided a matter of state criminal procedure, namely, that the *Dorado* rule would not result in reversals of judgments which had become final prior to a certain date—the date that *Escobedo* was decided by this Court. It seems further obvious that the California Supreme Court could have decided (possibly more correctly), as a matter of California law, that the *Dorado* rule could be retroactively applied in California (for the same reasons that the rule established in *People v. Morse,* 60 C.2d 631, 388 P.2d 33, 36 Cal.Rptr. 201 was held to be retroactive in state practice). In either event, the California Supreme Court would be adopting a rule of local practice and procedure, no matter what the *reasons* for that rule might be.

In the decision in the *Polk* case, sought to be here reviewed, the California Supreme Court merely gave a definition to the term "final judgment" a matter which had not been made clear in *Lopez.* Once again the state Court relied on language in an opinion of this Court (i.e., on footnote 5 of *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731) in arriving at this definition. But whether the state Court's interpretation of this Court's decision in *Linkletter* was or was not correct, it is again obvious that it was merely pronouncing a rule of local practice and procedure, a matter which is not within this Court's power of review.

The major premise in Petitioner's argument to invoke this Court's jurisdiction in this case is that the state Court promulgated certain rules of local practice upon a *misconception* of minimum Federal standards of procedural due process and therefore that a federal question necessarily is involved in such local rules. This premise rests on a confusion between the *effect* of a local rule and the *reasons* given by the state Court for its promulgation. None of the local rules under consideration in this case involve an incorrect determination of the constitutional invalidity of a state statute which might affect the constitutional consideration of like statutes in many states (e.g., the basis for the jurisdiction of this Court in *New York v. O'Neill,* 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564). The state Court's decision in the instant case only affects California criminal practice and procedure. To this extent the present case is analogous to *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252, where a Maryland Court overturned a state conviction for criminal contempt on the ground that it was compelled to the conclusion by certain constitutional decisions of this Court. The Attorney General of Maryland petitioned for Certiorari to this Court on the premise that a federal question was involved in the Maryland decision. This Court properly denied certiorari. Since the Maryland decision did not result in any possible *infringement* of a right guaranteed by the Federal Constitution it simply was a matter of local practice, notwithstanding what the reasons for the decision may have been.

The same holds true for the present case. Therefore, respondents urge that this Court deny certiorari on the ground of lack of jurisdiction to review the decision of the California Supreme Court involved.

II. CERTIORARI SHOULD BE DENIED AS AN EXERCISE OF SOUND JUDICIAL DISCRETION BECAUSE THE DECISION OF THE STATE COURT IS ESSENTIALLY CORRECT.

Even assuming that this Court has jurisdiction to entertain the questions presented herein, certiorari should nevertheless be denied as an exercise of sound judicial discretion as required by Rule 19 of the Rules of the United States Supreme Court.

A. The prospective operation of Escobedo and Dorado does extend to the guilt trial in the present case.

The California Supreme Court has held that the *Dorado* rule should only have prospective operation. However, under the test of finality set forth in *Linkletter,* it has further held that the rule will apply to all cases where the right to petition to this Court for certiorari has not expired prior to June 22, 1964—the date on which *Escobedo* was decided. Petitioner does not quarrel with the *Linkletter* test as a general rule for providing the cut-off date beyond which constitutional decisions may not be given prospective effect. He agrees that if respondents had filed a petition for certiorari within ninety days from the date in which the California Supreme Court affirmed the judgment of guilt in the present case that their right to have *Dorado* apply to that judgment would have been pre-

served since *Escobedo* was in fact decided during that period of time. He claims, however, that there should be no prospective application because respondents did not file for certiorari following the affirmance of the guilt judgment by the state Court and contends that the *Linkletter* decision should not be interpreted to encompass this situation.

Respondents contend that petitioner's claim involves two fundamental errors: (1) Respondents' right to petition for certiorari from any final state judgment of guilt had not expired at the time that the California Supreme Court recalled the original remittitur and reversed the judgments in their entirety in the present case, and (2) Even assuming that respondents' right to petition for certiorari did expire ninety days after the original decision of the State Supreme Court affirming the guilt judgment there would be no valid ground for depriving them of the prospective application of the *Dorado* rule merely because a petition for certiorari was not filed within that period of time.

1. There was no final judgment on the issue of guilt as to preclude the application of the Dorado rule when the guilt judgment was reversed by the Court below.

Respondents submit that, under applicable Federal rules (which obviously must apply to this question), the time to petition for certiorari to the United States Supreme Court had not yet *elapsed* with regard to any judgment on the issue of guilt at the time that the State Supreme Court reversed said judgment. Therefore, even under an interpretation of the *Linkletter* test acceptable to the Petitioner, the *Dorado*

rule is applicable to such a judgment, even by prospective operation.

Although the right to seek federal review of state Court judgments *commences* at the time that a final decision is rendered by the highest Court of a state (28 U.S.C. section 1257 (3)), there may be more than one such reviewable state Court decision in any given case. As a general rule "final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. U.S.*, 302 U.S. 211, 82 L.Ed. 204, 58 S.Ct. 164; *Parr v. U.S.*, 351 U.S. 513, 100 L.Ed. 1377, 76 S.Ct. 912. In other words, the state Court decision is generally considered to be "final" (to the extent that the *right* to petition for federal review matures) "when it terminates the litigation . . . on the merits and leaves nothing to be done but to enforce by execution what has been determined". However, where the interests of justice so require a defendant may also have the right to seek federal review from certain kinds of interlocutory judgments prior to the rendition of final sentence. Thus, in *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, the defendant was convicted of murder. The Maryland Appellate Court remanded the case for a retrial on the question of punishment but not on the question of guilt. It was held that the defendant had a *right* to seek certiorari from this order, since "(I)f in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him". (373 U.S. 83 at 85, n. 1.) It was *not* held that the defend-

ant would have been precluded from seeking certiorari had he in fact waited for a final judgment after sentence. Such an appeal would have been timely under the general rule announced in *Berman*.

In *Reece v. Georgia*, 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167, the defendant was convicted of rape and was sentenced to death. On appeal the Georgia Supreme Court decided a constitutional question against the defendant but reversed on another ground. On retrial the defendant was again convicted and sentenced to death, and the Georgia Supreme Court affirmed. The defendant then sought certiorari, raising the constitutional question decided on his first appeal. It was urged that the case was not properly before this Court because the defendant had not applied for certiorari within 90 days after the first judgment of the Georgia Supreme Court. This Court stated:

> "This contention is clearly without substance. A timely application for certiorari to review the second judgment was made, and the case is properly here. 28 U.S.C. section 1257. We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation". (350 U.S. 85 at 87.)

That there may be more than one appealable decision in federal practice is made perfectly clear by *Corey v. U.S.*, 375 U.S. 169, 11 L.Ed.2d 229, 84 S.Ct. 298. There the defendant was convicted of certain federal offenses. The District Court entered an order under 18 U.S.C. Section 4208(b), a unique federal statute which permits it to commit the defendant to

the custody of the Attorney General pending receipt of a probation report. Three months later, after receiving the report, the trial Court sentenced the defendant. On appeal the question was raised whether the defendant's right to appeal had commenced at the time of the original order and therefore whether the appeal from the final sentence was timely. This Court held that the defendant could appeal from either decision of the trial Court; that the first decision was sufficiently "final" to permit an appeal and that the second order was also a final judgment from which the defendant would appeal. It was stated:

> "Long accepted and conventional principles of federal appellate procedure require recognition of the defendant's right to await the imposition of final sentence before seeking review of the conviction. That is the general rule". (375 U.S. 169 at 176.)

By virtue of this "general rule" of federal appellate procedure, it seems clear that respondents still had the *right* to petition for certiorari, on the serious federal questions raised by the introduction of confessions during the trial on the issue of guilt, at the time that their case was reviewed by the California Supreme Court after the second penalty trial, since at that time there had not yet been any final determination of sentence. This is so even though they *could have* petitioned for certiorari within ninety days of the State Supreme Court decision affirming the judgment of guilt on the first appeal. Since the time to petition for certiorari had not *elapsed* when the Cali-

fornia Supreme Court recalled the original remittitur and reversed the guilt judgment, there was no such "final judgment" (even within the meaning of that term as acknowledged by Petitioner) so as to preclude the application of the *Dorado* rule.

Although the California Supreme Court in the present case applied the *Dorado* rule on the sole ground that respondents' rights to petition for certiorari from the original decision of that Court affirming the guilt judgment had not elapsed because 90 days had not expired from that original decision when *Escobedo* was decided, under Rule 22. In a more recent decision that Court adopted the argument herein set forth. In *People v. Ketchel,* 63 A.C. 921, 409 P.2d 694, 48 Cal.Rptr. 614, the defendant originally was convicted of first degree murder and sentenced to death. In May 1963 the California Supreme Court reversed the penalty judgment and affirmed on the guilt issue. In a second penalty trial the defendant was again sentenced to death. On appeal the State Supreme Court held that even though more than ninety days had elapsed between its first decision affirming as to guilt and the decision of this Court in *Escobedo,* nevertheless the *Dorado* rule should apply to the first guilt trial since the defendant's *right* to petition for certiorari had not yet elapsed under applicable federal rules of appellate procedure. It is obvious that the interpretation of federal appellate procedure contained in *Ketchel* is correct, and therefore the claim raised by petitioner in his first question presented in the present case is moot. Since respond-

ents could have petitioned for certiorari on the guilt issue even after the appeal from the second penalty trial, the *Linkletter* test, even as interpreted by petitioner, would apply to permit the application of the *Dorado* and *Escobedo* rules to the guilt judgment.

2. There is no valid ground for depriving respondents of the prospective application of the Dorado rule under the Linkletter test merely because they had not petitioned for certiorari within 90 days after the first decision of the State Supreme Court affirming the judgment on the issue of guilt.

The *Linkletter* test for defining the scope of prospective operation of constitutional decisions is a logical one. A defendant may have the benefit of a new prospective constitutional rule if, under the applicable rules of federal appellate procedure, it is not too late for him to have any state proceedings which are affected by the rule directly reviewed by this Court. Under Rule 22 he has a right to seek review by this Court on certiorari of an final state Court decision within ninety days from the rendition of that decision. Once the 90 days has elapsed this Court would have no power to review the affected decision on certiorari and therefore the defendant's ability to have the new constitutional rule applied to the final state Court decision on direct review would have lapsed.

Based on the erroneous assumption that respondents' right to petition for certiorari from the guilt judgment expired 90 days after the decision of the State Supreme Court affirming that judgment, petitioner argues that respondents should not have the advantage of the prospective operation of *Dorado* in

their guilt trial because they in fact failed to seek certiorari within the prescribed period of time. Had they so petitioned he would accord them that advantage. Even assuming his basic assumption to be correct, it is obvious that the distinction he attempts to draw is both unrealistic and unfair when applied to the facts of the present case.

The respondents are indigent persons who, throughout the course of legal proceedings to date, have been represented by numerous sets of appointed counsel. The appointments of the first set of attorneys expired at the end of the first trial. Thereafter, respondents were represented by a second set of attorneys on their first state Court appeal. These appointments terminated after the first State Supreme Court decision (which occurred prior to the date that this Court decided *Escobedo*). The Tulare County Public Defender's Office was then appointed for the second trial, but withdrew because of a conflict of interests. A fourth set of attorneys was then appointed by the trial Court to represent the respondents during the second penalty trial. It was shortly after this appointment that *Escobedo* was decided. Less than a month after the *Escobedo* decision the second penalty trial commenced. There is no showing, and little real likelihood, that the fourth set of appointed counsel had the time, knowledge or resources to prosecute a petition for certiorari to this Court based upon the possible application of *Escobedo* to the first guilt trial. These attorneys had nothing to do with the first guilt trial. Furthermore, it is unlikely that their appoint-

ment by the trial Court included any compensation for prosecuting federal appeals. It was only after the 90 days had expired that a fifth set of attorneys was appointed by the State Supreme Court to handle the second automatic appeal.

In view of these facts it is totally unrealistic to assume that respondents knowingly waived their rights to petition for certiorari to this Court within 90 days after the first decision of the California Supreme Court. Furthermore, it would be unjust to conclude that any valid distinction could be drawn between these respondents and some other defendant who might have been in a better financial position to have such a petition prosecuted on his behalf during the allegedly crucial period of time. For these reasons, the suggested distinction in petitioner's argument concerning the interpretation of the *Linkletter* test should not be adopted by this Court, even in those cases where the distinction might make a difference.

Petitioner's final argument is that the administration of criminal justice will be adversely affected by the adoption of the interpretation of the *Linkletter* test given by the California Supreme Court. This contention already has been rejected by the California Supreme Court in *People v. Ketchel, supra,* where the following determination was made:

> "There are a limited number of cases in which the judgment of guilt was affirmed over 90 days before Escobedo but not the judgment as to penalty, and the granting of relief in cases such as the present one clearly would not impose the 'im-

possible burdens upon the administration of criminal justice,' with which this court was concerned in *In re Lopez, supra,* 62 C.2d 368, 371." (63 A.C. 921 at 928.)

B. The Dorado and Stewart decisions involve correct interpretations of the Federal Constitution and should not be reviewed by this Court.

Questions numbered 2, 3 and 4 presented herein have been briefed and argued at length in *California v. Stewart,* 381 U.S. 937, and the issue of the scope of *Escobedo* will not be argued again in this brief. Assuming that this Court accepts jurisdiction over these questions, respondents urge that the decisions of the California Supreme Court in *Dorado* and *Stewart* be upheld. In support of these decisions respondents would only suggest one point: Nobody disputes the value of providing suspects with the advice of counsel during the accusatory stages of the criminal proceeding so long as the ability of law-enforcement to secure evidence against guilty suspects is not severely hampered. Those who have raised the hue and cry against the *Dorado* rule assert that it necessarily will result in fewer confessions. To date this assertion has not been supported by any evidence that it is true, nor is it likely that it ever shall be. Of course, to claim that the presence of defense counsel in the accusatory stages of a criminal proceeding is somehow disruptive of the efficient administration of criminal justice is an unfounded insult against the entire legal profession. Beyond that, as anyone versed in the realities of criminal proceedings will acknowl-

edge, the criminal who has a "compulsion to confess" will not be deterred from doing so by the simple admonition of a police officer that he "has a right to see a lawyer and a right to remain silent".

CONCLUSION

Respondents submit that this Court has no proper jurisdiction to review the judgment of the California Supreme Court in the present case since the decision solely involves matters of local practice and procedure and, furthermore, since the decision rests on adequate independent grounds of state law.

In addition, certiorari should not be granted as an exercise of sound judicial discretion, even if federal questions are raised by the state Court decision, since the California Supreme Court correctly decided the federal matters upon which the decision was, in part, grounded.

Dated, Oakland, California,
April 11, 1966.

Respectfully submitted,
CHRIS G. GASPARICH,
Attorney for Respondents.